IN THE MATTER OF

PELHAM BAY PARK.

MR. BARTLETT'S OPENING ARGUMENT

FOR THE CITY.

New York, March 5, 1886.

Present—Commissioners Marsh and Page.

Appearances—Franklin Bartlett, Esq., for the City.

Mr. Bartlett—May it please the Court: After many months the claimants for awards in the Pelham Bay Park have finished their case. The hearing has been exhaustive, and your Honors have listened with unwearied patience ever since the 30th of January, 1885, when we commenced to listen to the proofs of title and of values which should be adduced by the land-owners and the persons claiming the awards. It now becomes my duty and my privilege to open the case for the City of New York. I say privilege, for I consider it a privilege to defend the interests of this great municipality in a case which so largely affects the City Treasury and the taxpayers upon whom the burden must ultimately fall; for in either event, whether these awards are paid for by the issue of new bonds, or by the insertion of the amounts of the judgments to be obtained in the City tax levy, the burden must ultimately fall upon the taxpayers at large. Our court of last resort—the Court of Appeals—has declared the New Park Act to be constitutional. The only question, therefore, which remains to be solved is that question, which your Honors will have to determine: What shall be paid for the lands taken? This question is one of great practical importance—it is one which affects indirectly every resident of the City and County of New York—it is one which affects directly every taxpayer. Your Honors, as soon as you were organized, became a Court, as was decided in the matter of the Niagara Reservation, in which the distinguished presiding Commis-

sioner here was also a Commissioner, and where the General Term of the Fifth Department held that Commissioners, as soon as organized, become a Court. In you are united the dual functions of judges and jurors, and you derive your powers as a Court from the organic law of the State—the Constitution— and also from the language of the New Park Act itself. You are the judges of the values—the sole judges—and, in the absence of any substantial error as to the admission of evidence, no successful appeal can lie from your finding.

The position of the City here is not like that of an ordinary defendant; it occupies rather the position of a trustee—of a trustee acting in a fiduciary capacity for the great body of citizens, and so bound to see that the City is not mulcted in any enormous amount.

What is the character of this proceeding? It is a proceeding under the law of eminent domain—that great branch of law under which private property is taken for public use. It is a sovereign power which has existed for centuries; it is a sovereign attribute which is possessed by every State, which arises from no contract or arrangement between the State and the private individual, but has its foundation in the imperative law of necessity. As that eminent jurist, Judge Cooley, said in a great Michigan case, it would be impossible for a government to further the prosperity of its people if, at the option of individuals, the right to exercise eminent domain might be withheld. It is only necessary to show the importance of this branch of the law, to point out the fact that without it every public improvement would be stopped. There would be no streets or highways, no railroads or canals, no bridges, no parks or public places, nor any improvements of any kind.

Now, while it is true that all sovereignty in a constitutional government like ours rests in the people, the people bestow their powers on the Legislature, and the Legislature, by virtue of this bestowal, has the right to exercise eminent domain. And as this right of eminent

domain pertains to the sovereignty, entirely aside from the question of the ultimate ownership of property, and is beyond it and paramount to it, it is not too much to say that the right could be exercised without making compensation, were it not for the safeguard which is provided in our constitution, and which is also found in the Federal Constitution.

It was thought after the adoption of the Federal Constitution that the citizen did not have his rights sufficiently preserved, and that consideration, and the debates which then ensued upon the exercise of the right of eminent domain, or its possible exercise, led to the adoption of the Fifth Amendment, which provides that private property shall not be taken for public use without just compensation.

What are the two pre-requisites which are provided in the Federal Constitution and in the constitution of the State of New York—for the language is identical? "No person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation." Here we have the two pre-requisites for the exercise of this power. First, the due process of law. Now, what is due process of law?

The Seventh Section of Article I of our State Constitution provides that when private property shall be taken for public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record. So we must have either a jury or three commissioners; and then what else is required to make "due process?" But two other things are essential: due notice to the land-owner and a fair hearing.

The Court of Appeals has held in this very case, the opinion being written by Judge Finch, that due process of law entitles the property-owner to notice of the proceeding against him and an opportunity to be heard, and the Court

of Appeals effectually disposed of all the objections which had been raised against this act based on the theory that no sufficient process of law was provided for. The Court held that the procedure and the method to be taken were matters within the discretion of the Legislature; as long as adequate notice and the substantial right to a hearing were guaranteed, the act was constitutional. Moreover, whatever objections of this character might have been urged in the beginning against this act have lost all their force from the action taken by the Commissioners, because there can now be no question as to adequate notice and the patience and fairness of the hearings which have been granted to these claimants.

We now come to the other question—the other prerequisite—aside from the due process of law. What is that? That just compensation shall be made to the citizen. What is the meaning of this expression? Although we find the words "just compensation" used in most of our State constitutions, used in the Federal Constitution, and the constitution of the State of New York, in some States we find other words, and, notably, in the State of Massachusetts, the language is "reasonable compensation," so that it would seem that "just compensation" means "reasonable compensation." But, aside from any constitutional construction, the Courts have told us in many cases what this language means. Just compensation means the fair market value—the fair market value in the open market. And the Supreme Judicial Court of Massachusetts, a year or two since, defined expressly the term "market value." Market value, says that Court, means the fair value of the property as between a man who wants to purchase and one who wants to sell any article—not what could be obtained for it under peculiar circumstances when a greater than its fair price could be obtained—not its speculative value, not a value obtained from the necessities of another. The damages then must be measured by the market value of the land at the time of the taking—not its value to the petitioner on the one hand, nor to the respondent on the other, not the value which it might have under different

circumstances than those existing; and I say, it is the established and settled law of this State that any contingency of future development cannot be taken into consideration, nor can the Court, in making its awards, consider the desirability or fitness of the land taken for the particular public use intended. The last point was decided within a year or two by one of our General Terms. The reason for this is, that it was the intent of the law and is the intent of the law that no profit shall be made out of the State or City. The intent of the law is, that the property-owner shall have the value of his property and nothing more, and that he shall not make a profit out of the State or City, or a petitioner exercising the right of eminent domain.

So much for the law.

How has the testimony produced by the land-owners conformed to these rules of evidence? I have here the tabulated result of the values of the property-owners' experts, and these tables will be furnished to any gentlemen present who would like them.

Let us glance at the fabric which has been constructed by the property-owners and their experts, which might well be likened unto a Burmese pagoda inasmuch as it is most conspicuous for the love of gold therein displayed.

We commenced with the testimony in this matter on the 30th of January, 1885, and the record now forms a bulky volume of nearly a thousand pages. And I wish to state that whatever delay there has been in this proceeding has not been the fault of the Court, nor has it been the fault of the counsel for the City—it has been due to the procrastination and postponement of the property-owners, who were evidently inspired by the manifest dread lest, in the presentation of their claims, they should be outstripped by their neighbors in the largeness of the awards asked for. That was, indeed, a mistaken dread; for all, rich and poor alike, have united in claiming for their land far more than could have been anticipated in the wildest dream of a mad enthusiast.

A great English novelist, if your Honors please, has said that no one preserves the imagination after 40 years. He certainly could not have listened to these experts in this Pelham Bay Park matter; for here all of these experts, far past 40, have shown that their imagination was still very vivid. They have in fact, given loose rein to the imagination and allowed their fancy to run riot. Now, what does their testimony amount to? This in brief: That we must pay for these lands taken the enormous, monstrous sum of $5,050,000. For what do they ask us to pay this sum? For 1,700 acres of land, with a few buildings, all lying three miles beyond the confines of this county, and in the town of Pelham. I do not assail the property-owners, for the greed of gain or love of gold is one of the most potent and all-absorbing of human passions. *Auri sacra fames*, "The cursed greed of gold" is just as fierce now as it was in the days of Virgil. And possibly some of these land-owners may really believe that the values they ask for are genuine. Nor do I wish to attack the experts, because I am well aware of the result of thinking for months in one particular train of thought, and I know that the facts that we shall bring out will form a sufficient arraignment and indictment of the views of these experts. Their estimates have been so exaggerated that they have caused, not unnaturally, a feeling of indignation throughout the whole community, and this feeling has been so strong that even some of the gentlemen who seek awards have come to me and said: "What do these men mean by putting such values on my property; I want no such price for my land."

Let me, for a moment, call the attention of the Court to the peculiarities of some of the experts. Let us see upon what they base their financial ideas. Let us take Mr. Campbell. He has been called to the stand. He is the superintendent of Larchmont Manor, and he bases his ideas of the value of the property upon what he considers the value of the property there in his own pet project, and one or two other places along the Sound. It has been sufficiently brought out in the evidence, and it will be strengthened

further, that the character of those places upon which he bases his valuation is entirely and radically different.

Let us take Mr. LeCount. He is another expert. I say that his estimates are not entitled to any weight whatsoever, that they should have no weight before your Honors, because they are based entirely on prospective conditions — on something which may take place a half-century hence, or a century hence, and on a condition of affairs which is non-existent to-day, and which your Honors have no right to consider. He expressly divides all these areas and tracts into quarter-acre plots and acre plots, and on that future development, its division into village plots and lots, he bases his present valuation.

In regard to Mr. Findlay, I was amused somewhat by his frank confession that he could not attempt to give the market value of this property. He said it had no market value as far as he knew, and he could not give it; so, of course, his testimony is entitled to no weight.

What was the condition of this area when the Park act was passed in 1884—of the portion of the 3,166 acres in the town of Pelham, viz.: 1,700 acres which is included within the area of the Park? Except the little settlement or hamlet at Bartow, there had not been six houses built within twenty years. There was only one store, and not a church, or a manufactory, or a school-house in the whole district. The farming lands were lying fallow, the meadows were waste and barren, as Mr. Hunter himself testifies in regard to one of his farms. I remember well the occasion of my first official pilgrimage through the Pelham Bay Park; how I was impressed with the barren and waste appearance of the whole tract; how I was impressed with the grass-grown drives and the creaking piazzas, and the general aspect of ruin. It was upon this moribund and stagnant district that the passage of the New Park Act came like manna. It was indeed a Godsend, for these men had been for years and years trying in vain to dispose of their prop-

erty. Their experts say there were no sales—in other words, there was no market. How little they realize what a fatal admission that is to any claim for high values, for all political economists will tell you that where there have been no sales and could be no sales, the result is always a lowering of the market price. Now, I wish to illustrate. Take the dry goods trade. If there is an over-production, or a glut arises from any cause—a glut arises from the failure to sell, or from a general stagnation of the market—prices go down, irrespective of what the goods have cost; and it is not very rare in this City to see great sales of print-cloths where the production of the mills are sold out at a great loss. What is the cause of that? Because there had been no sales of any magnitude for months before. So, naturally, the market price goes down, and the goods have tobe disposed of; and, I say, the same general rule applies in regard to this land. They couldn't sell it, and therefore, there was no market, and whatever price was upon the land necessarily declined.

What do we propose to do? We propose to show your Honors that the lands and buildings here taken were not worth in 1884—in June, 1884, when this act was passed—more than one million and a half dollars. We propose to show it by four distinct kinds of evidence. We propose, in the first place, to show you the sales within the park itself. It is true, as the experts on the other side have testified, that there have not been many sales, but still, there have been seventeen or more sales since 1879, and whereas, it might be claimed that the older sales were no indication of values, it is certain that sales made within a short period, and within the area itself, are evidence of what the true value should be.

Where, in December, 1881, 55 acres and the buildings were sold for $26,000, it can hardly be claimed, with any show of right, that 31 acres of the same land are now worth, without the buildings, $103,000.

Nor where, in 1884, 7 acres of a certain piece of land were sold for $7,000, and in the same year an acre and three

quarters of the same for $2,500, and in 1879, 107 acres of the same tract had been sold for $51,677, I say that the claim of $368,443 for that tract, without the buildings, is a manifest fraud. And so, too, the $17,000 paid for the 32 acres of the James Morris property is some indication of what the real value of the property is, because that sale took place in June, 1883—only a year before the passage of this act. And again, the $8,500 paid by Mr. Hoyt for Twin Island in 1881 is very significant, and at once stamps as preposterous and ridiculous his claim of $100,000, which he now presents for the land alone. So, too, the sale in 1880 of Hunter's Island for $102,000 shows that the claim of $575,000 now presented is beyond the bounds of reason, and is absurd. We shall also call your Honors' attention to the fact of the recent foreclosure sale of the Secor place, where some 45 acres were sold for $14,000—14 acres of which are included in this park.

Our second branch of evidence will be the sales in the vicinity—the sales in the lower part of Westchester County. Of course, the latitude of our proofs, and the extent to which we shall go into these sales in the County of Westchester, will depend largely upon the ideas of the Court; it is certainly within the discretion of the Court; but we can show that, in some localities even within the limits of the City and County of New York itself, no such prices as those claimed here have ever been realized. I mean to say that there have been sales within the limits of this County within a few years which would fix the values asked for now for the Pelham Bay Park property at much lower figures then their experts claim. We will take the lower towns of the County of Westchester—Westchester, and Eastchester, and Yonkers, and New Rochelle, and Pelham. The Pelham Bay property, property in the town of Pelham, is worth less than land in any other of these towns, and we shall show you sales in the other towns—of course, we shall not go into Yonkers, because that is a city by itself—but we shall show you sales in Westchester, and Eastchester, and New Rochelle, which will prove how fabulous are the sums now sought to be recovered.

In Pelham itself we shall show a sale in July, 1882, of $4\frac{1}{3}$ acres for $4,635, and in December, 1882, a sale of 12 acres for $3,000. In December, 1883, $4\frac{197}{1000}$ acres sold for $6,500. In February, 1885, $4\frac{1}{3}$ acres sold for $3,000. In September, 1885, 6 acres sold for $1,000. In 1882, 3 acres of salt meadow were sold for $200. And $1\frac{1}{2}$ acres on the Boston Post road were sold for $1,758, or an average of $150 an acre. We shall show in Pelham Manor a sale of 17 acres in November, 1884, for $23,293; and in December of that year, one of nearly 14 city lots for $1,593. In February, 1885, $4\frac{1}{3}$ acres were sold for $3,000.

Then we come to Westchester. We can show you there sales of 5 acres of salt-meadow in 1882 for $300; in June, 1882, of nearly 26 acres for $10,000; in June, 1883, of 206 acres on the Boston road, for $32,000; in October, 1883, of 18 acres near Williamsbridge, for $8,000. In Eastchester, in December, 1882, $9\frac{1}{2}$ acres were sold for $1,350; in March, 1883, about 20 acres brought $10,000.

In New Rochelle—and it should be premised that New Rochelle is a place of some 6,000 inhabitants, and perhaps the most progressive village or town in the County of Westchester, and one of the most desirable places for summer residences—we can show that in October, 1882, there was a sale of $2\frac{1}{2}$ acres at $600. And we shall call your attention to sales in March 1882, of $31\frac{1}{2}$ acres, for $2,700; in December, 1883, of $2\frac{1}{4}$ acres, very desirably located, leading to the steamboat landing, for $3,250; in April, 1884, of 4 acres and a house for $5,000; in March, 1884, of 14 acres, for $550, and in September, 1884, of $11\frac{1}{2}$ acres for $1,738. Some of these sales in New Rochelle are worth noticing to greater extent; for instance, take the sale from Prime to Leroy, in June, 1885. The consideration there was $25,000. That was for 31 acres, with a house and stable worth $20,000, and a water-front on New Rochelle creek, and fine shade trees. The average price for that land was $163 per acr. Take the sale from the Manhattan Life Insurance Company to Adrian Iselin, Jr., consideration $32,000 for 38 acres; the average price for that land was $781 an acre. This was in

the best portion of New Rochelle, known as the Leland place. Take the sale of Underhill to Iselin, Jr., 89 acres, the average of the sale per acre, including the buildings, was $654. Take the sale from Coudert to Lang, in September, 1882, where the average realized was $375 an acre. At the sale of 33 acres to David H. King, in 1882, where the land was exceptionally fine, the sum realized was $758 an acre. Take the sale from Smith to Hudson, in 1886, where the land brought $264 an acre—57 acres in the heart of New Rochelle—and so on. I might multiply these instances almost indefinitely, but I have stated enough to show our line of proof in regard to sales in the County of Westchester and in the vicinity of Pelham Bay Park.

There is another class of proof which we shall introduce, and that will be the Assessors' estimates or valuations already in evidence. We shall call the attention of the Court to this Assessors' roll, because it is already in evidence. And your Honors may remember that, whereas Mr. Mills says that the Assessors' valuations may not be evidence for certain purposes, still, they are evidence to contradict the estimates made by the land-owners. I shall argue that these returns or valuations made by the owners, and the values fixed by the Assessors, because the Assessors have only the returns of the owners upon which to base their valuations, are evidence, and are entitled to some weight—what that exact weight is, it will be for your Honors to determine; but it is certain that the valuations fixed by the Assessors will serve to show how enormous and monstrous the values of the property-owners' experts are, and how far beyond the realm of reason.

Then we come to our fourth class of evidence—our experts. We shall place on the stand men whose names alone will be a sufficient guarantee of an honest and fair valuation. We shall put on men who are known throughout the whole City of New York, and whose judgment as to the value of property is entitled to the greatest consideration, not only from the public, but from any Court.

I will indicate to your Honors what we propose to show —what valuations we assert are just, and fair and honest,

and why we think that the sums now claimed are unworthy of any consideration, and are manifestly, in a legal sense, fraudulent. In regard to the acreage claimed—which as a rule is nearly correct—there are some slight variations of a few acres. Of course, the Court will accept the measurements of the engineer of the Commission, and so will the City, and I presume, so will the land-owners, and therefore there will probably be no issue as to that. In some cases the variation is two or three acres, and sometimes more, but as a rule the estimates are nearly correct.

We shall show that the value of the Bartow property, 213 acres, or 217½ acres, instead of being as stated by the experts $467,953, is only $131,000, and that that is the full market value of the property.

We shall show that Mr. Duryea is entitled, for his 92 acres of land and his buildings, to the sum of $39,000, or thereabouts, instead of $197,000, as he claims.

We shall show that the Furman estate is entitled to not more than the sum of $121,000, instead of $344,000, the sum claimed by its experts.

We shall show that for the Twin Island property, the total award should be $63,000—$48,000 for the buildings and $15,000 for the land—instead of $150,380 asked for.

We shall show that the Bayard farm of Mr. John Hunter, instead of being worth nearly $446,000, is worth $106,000 at the most.

We shall show that the Hurst property, instead of being worth $177,000, the average valuation of the experts on the other side, is worth at the most $32,750.

We shall show that the fair price that the City should pay for Mr. Iselin's place is $175,000, instead of $575,000.

In regard to the Marshall estate, we shall show that the honest valuation for that property should be $88,000 instead of $236,000, as claimed.

We shall show that for the Monroe place the correct valuation is $19,250—$14,000 for the building and $5,250 for the land—instead of $34,812 asked for.

We shall show that the R. R. Morris estate should be awarded about $137,000—that is $127,000 for the land and $10,500 for the buildings—instead of $437,000 claimed by the experts.

We shall show that the James Morris property, now used by the Country Club, is worth $58,000 - that is, $36,000 for the land and the rest for the buildings—instead of $89,000 and upwards claimed.

We shall show that the 17 acres of the Raymond property are worth $17,000, instead of $59,000.

We shall show that the Schuyler estate would be amply paid by an award of $37,500 instead of $69,000, or thereabouts, claimed on an average.

We shall show that Mr. Steers should be awarded not more than the sum of $41,000, instead of $92,000 asked for.

We shall show that Mrs. Ellen Ward should not receive more than $46,000 instead of $139,000 demanded.

We shall show that Mr. Witherby, for his 32 acres, should not receive more than $33,000, that is, including the buildings, instead of $120,000 asked for.

We shall show that the Charles Squire Wood property would be amply paid for by an award of $175,500, instead of nearly $386,000 demanded.

It is not necessary to burden you with a very careful and exhaustive recapitulation or explanation of our evidence. I think that I have sketched with sufficient particularity our case. That is, I have outlined it sufficiently in detail to warn the property-owners and to give notice to the Court of the line of our evidence.

I was impressed in reading Judge Finch's opinion in this case, with a certain portion where he says, in substance, that if certain and adequate payment be not provided, the right of eminent domain is transferred into a legalized plunder of the citizen. Now, I say that if these valuations which have been sworn to by these experts for these land-owners be adopted, it will be a legalized plunder of the City of New York.

We shall produce our experts, and they will testify according to their conscientious judgment. They will not put low estimates in order to have the Court strike an average—they will testify to what they think is the full value. Our position here is an impartial one; we have no direct personal interest such as the land-owners have, and the experts on the other side, and which is apt to warp the judgment. We are acting here as the representatives of others, and being impressed with that fact, we shall deem it our duty to state what the real, honest compensation should be, and not seek to place it below the true value. And in preparing our estimates and our evidence, we have intended to give these gentlemen all that their land is really worth.

We shall ask your Honors to listen to our proofs, and to view these lands once more, or as often again as you please, and then to make such awards as will leave this Court in honored memory when every root and branch in Pelham Bay Park shall have passed away, and long after the all-embracing mould shall have claimed us for its own.

The Commission then adjourned to Thursday next, March 11, at two o'clock.